CREATING A BETTER BALANCE IN TITLE VII CASES THROUGH THE SOCIAL LEARNING THEORY

NIKKI K. BHAVSAR*

I. INTRODUCTION

Imagine the pressures facing the chief of police—delegating forces to different tasks in the city, overseeing the department's finances and operations, meeting with city officials, and assuring the protection of the city, all while attempting to remain a symbol of hope and peace for those who need it. The chief of police needs to balance these external obligations with other internal matters within the police force, such as hiring and promoting entry-level officers. Promotions are often based on the results from objective examinations, which indicate the most qualified candidates for the added responsibilities.[1] However, for the chief of police, the simple decision of promoting an officer is grounds for a lawsuit.

It is easy to picture a New York chief of police sighing in relief as the courier drops off a sealed yellow envelope from the state. After ripping off the seal, the chief anxiously grabs the first page to see who will be promoted within his department. He sits down as he reviews the statistics for promotion: ten white males, one white female,

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* J.D. Candidate, Florida State University College of Law, 2019. B.S. in Political Science and Psychology, Florida State University, 2016. Thank you to Professor Mary Ziegler for inspiring me to write this Note, believing in my vision, and mentoring me throughout this process. Also, thank you to Professor Charlee Taylor for teaching me the wonders and complexities of legal writing. Lastly, thank you to my mom, Alpa Bhavsar, for giving me the opportunity to be the absolute best version of myself.

1. Ricci v. DeStefano, 557 U.S. 557, 562 (2009).

and one Latino male. Not a single African American officer. This is the third cycle with these less than ideal results. He is in an impossible situation: if he ignores the promotional list, there will be a lawsuit from the white males on that list alleging discrimination. If he abides by the promotional list, there will be a lawsuit from minorities alleging discrimination.

The fact pattern above is not a hypothetical: it captures the real dilemma facing a police chief in *Margerum v. City of Buffalo*.[2] In *Margerum*, the City of Buffalo made the active choice to expire the promotional list before the traditional four year time frame in which the list historically stayed valid.[3] As in the scenario above, the department was faced with a lawsuit from white individuals on the promotion list, while simultaneously facing a lawsuit from minority officers denied promotions based on the examination results of the last two cycles.[4] This no-win scenario seen in *Margerum* is far from unique. It begs the question, how can employment discrimination law do better in resolving disputes like the one in *Margerum*?

Scholars have readily taken aim at one of the two primary causes of action available under Title VII of the Civil Rights Act of 1964:[5] the disparate treatment theory.[6] Disparate treatment "is an intent-based theory of liability."[7] By contrast, the second primary cause of action available under Title VII, the disparate impact theory, manages "disproportionately adverse effect[s] on minorities."[8] However, following the 2009 decision of *Ricci v. DeStefano*,[9] the future of disparate impact claims is unclear, and employees must often solely look to disparate treatment theories for relief.[10]

Especially after *Ricci*, researchers have expressed concern about the efficacy of disparate treatment theories. In particular, law-and-psychology research has shown that disparate treatment misses much of the most disturbing and deep-seeded prejudice experienced

2. Margerum v. City of Buffalo, 28 N.E.3d 515, 516-20 (N.Y. 2015).

3. *Id.* at 517.

4. *Id.* at 516-17.

5. Hereinafter referred to as "Title VII."

6. 42 U.S.C. § 2000e-2 (2012).

7. Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1145 (2007) (discussing how focusing on a defendant's consciousness or state of mind in disparate impact cases has undermined the theory).

8. 42 U.S.C. § 2000e-2(k) (2012); Ricci v. DeStefano, 557 U.S. 557, 557 (2009).

9. Part II of this Note will delve further into the facts and holding of *Ricci*.

10. *See Ricci*, 577 U.S. at 585.

in the workplace.[11] Linda Hamilton Krieger and other commentators have relied on implicit-bias research, suggesting that while disparate treatment focuses only on intentional discrimination, workplace bias is often unconscious rather than deliberate.[12] Additionally, other researchers have focused on how the law fails to capture the psychological response of employees to real or perceived prejudice.[13] This research has culminated into a movement where researchers are advocating for the law to "expand what constitutes a legally recognized employment discrimination harm to better reflect the lived experiences of individuals who face discrimination."[14]

By looking at the social learning theory, a behavioral psychology theory that explains how observation and reinforcement lead to a path of continued behavior,[15] this Note breaks new ground by showing that disparate treatment also fails to account for the cyclical effects of a single discriminatory act, whether conscious or unconscious. The social learning theory illuminates problems with the disparate treatment doctrine that most current scholars miss. First, social learning theory shows that individuals activate and apply stereotypes because of the perceived values and behaviors of family members, colleagues, friends, and peers.[16] In this way, a discriminatory action, or even the perception of one, can have a cyclical effect at work, encouraging supervisors and co-workers to activate similar stereotypes due to reinforcement.[17] By focusing on the isolated intentions of one actor, disparate treatment ignores these intergroup dynamics. Lastly, disparate treatment also neglects the ways in which law feeds into the cyclical influence of prejudice. By sending the message that discrimination occurs only through the isolated actions of single actors with deliberate prejudices, the law reinforces implicit associations rather than undermining the bias that Congress intended to root out.[18]

This problem is particularly worrisome given the uncertain future of disparate impact post-*Ricci*. At least in certain circumstances, dis-

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11. Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 IND. L.J. 393, 393 (2016).

12. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1026-27, 1033-34 (2006).

13. Roberts, *supra* note 11, at 434-35.

14. *Id.* at 396.

15. ALBERT BANDURA, SOCIAL LEARNING THEORY 3 (1971).

16. *See id.* at 5.

17. *See* Lizabeth Barclay, *Social Learning Theory: A Framework for Discrimination Research*, 7 ACAD. OF MGMT. REV. 587, 587 (1982).

18. *See* 42 U.S.C § 2000e-2 (2012).

parate impact cases had served as a kind of safety valve for employees who could not prove a discriminatory intent on the part of their employers.[19] Given the kind of cyclical effects that social learning theory highlights,[20] disparate impact might have been especially helpful for employees affected by iterative prejudice. *Ricci*'s strong-basis-in-the-evidence test undercuts this remedy for workers affected by cyclical discrimination by "allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."[21]

Commentators have questioned the sweep and likely impact of *Ricci*.[22] However, while the Court undermined the efficacy of Title VII by undercutting disparate impact, it identified a meaningful problem with the previous legal regime. As the Court rightfully noticed, pre-*Ricci*, taken together, disparate impact and disparate treatment jurisprudence could leave employers in no-win situations and exempt some employers from disparate treatment liability in a way that Congress had never intended.[23]

To address these issues, this Note proposes a new balancing test that better accounts for the lessons of the social learning theory while also addressing the concerns raised in *Ricci*. At the heart of *Ricci* is a command to reconcile disparate treatment and disparate impact jurisprudence.[24] To do so, courts should shift away from a strong-basis-in-evidence test[25] and push towards the proposed balancing test which contains specific prongs. This would allow courts to return to casting a wide net of coverage but do so in a way that serves both employers and employees more justly. This new test would balance five prongs in determining whether the employer made the proper action in an individual case. The prongs include: (1) the severity and practicality of the employer's fear of litigation; (2) the good-faith effort of the employer to get rid of discrimination entirely in the past and present; (3) expectations previously established by the employer; (4) fairness to the employer and the employees; and (5) potential prejudicial attitudes that will be added to the community due to the employer's decision.

Compared to the strong-basis-in-evidence test, this balancing strategy creates a high bar for employers to clear before allowing "vi-

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19. Annika L. Jones, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221, 1225-26 (2007).

20. *See* BANDURA, *supra* note 16, at 3.

21. Ricci v. DeStefano, 557 U.S. 557, 583 (2009).

22. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

23. *Ricci*, 557 U.S. at 581.

24. *See id.* at 577-78.

25. *Id.* at 585.

olations of one in the name of compliance with the other,"[26] while making it possible for employers to identify cases that would—and should—trigger Title VII concerns. The balancing approach advocated here also recognizes that the law has the capacity to minimize cyclical prejudicial attitudes and that this minimalizing process starts with creating a flexible scheme for employers to work with.[27] The Court's primary concern in *Ricci* was that a "mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact."[28] By balancing multiple concerns, including the practicality of that fear, courts would now be able to recognize that a good-faith effort to eliminate discrimination is worth something systematically for society, while not allowing good-faith fear to overcome the goals Title VII sought to accomplish with disparate treatment.

This Note unfolds in seven parts. Part II of this Note explains how the court system arrived at the current model for handling Title VII cases, specifically those dealing with disparate treatment and disparate impact. This Part also reviews how *Ricci* has muddled the way employers consider disparate impact.[29] Part III of this Note canvasses existing scholarship on law, psychology, and employment. Part IV evaluates the social learning theory, showing how it adds to existing literature on the disconnect between employment law and psychology. In particular, this Part analyzes the ability of the social learning theory to explain how the law is enhancing prejudicial attitudes through the evolution of individuals' implicit associations, the way individuals activate and apply stereotypes, and the ways by which this then contributes to their intergroup attitude. Part V proposes a doctrinal change in the relationship between disparate treatment and disparate impact, in hopes that a defined balancing test will develop a clean-cut standard for employers that furthers the purpose of Title VII more effectively than the strong-basis-in-evidence test currently used. Part VI will actively look at possible missteps within the proposed doctrinal change and explain how the balancing test may overcome these counter-arguments. Part VII concludes.

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26. *Id.* at 583.
27. *Id.*
28. *Id.* at 581.
29. *Id.* at 586-93.

II. THE CONFLICTING RELATIONSHIP BETWEEN DISPARATE TREATMENT & DISPARATE IMPACT

Congress enacted Title VII to further equal opportunity and create a workplace devoid of prejudicial attitudes.[30] The law made it illegal for employers to discriminate on key elements of a person's sense of self, such as race, color, religion, national origin, and sex.[31] As the Supreme Court has reasoned, Congress intended Title VII to create a "workplace . . . environment free of discrimination, where [classifications are] not a barrier to opportunity."[32] To do this one must "promote hiring on the basis of job qualifications" rather than these classifications the individual cannot control.[33] In practice, employees have to establish one of two forms of discrimination to prevail in a Title VII employment discrimination claim.[34] This Part explores these theories of relief in turn.

A. Disparate Treatment

Disparate treatment was enacted in the original 1964 Act as the Equal Employment Opportunity Commission (EEOC) decided to act against intentional discrimination.[35] Focused on attacking discrimination that was more understandable and visible, disparate treatment claims gives the employee an opportunity to show, by a preponderance of the evidence, a prima facie case[36] of discrimination.[37] If successful, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[38] If the employer is successful, the employee still gets the opportunity to question the reasoning offered by the employer.[39] During this time, if the employee can show that the given motives were not the employer's actual causes of action, but rather a cover-up for discrimination,

30. Jones, *supra* note 19, at 1223-24.

31. 42 U.S.C. § 2000e-2(a) (2012).

32. *Ricci*, 557 U.S. at 580.

33. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

34. 42 U.S.C. § 2000e-2(a) (2012).

35. Jones, *supra* note 19, at 1224.

36. Plaintiffs can satisfy their burden by showing: (1) that they belong to a racial minority; (2) that they applied and were qualified for a job for which the employer was seeking applicants; (3) that, despite their qualifications, they were rejected; and (4) that, after their rejection, the position remained open, and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

37. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

38. *McDonnell Douglas Corp.*, 411 U.S. at 802.

39. *Tex. Dep't of Cmty. Affairs*, 450 U.S. at 253.

the employee will succeed on the claim.[40] To show evidence of a pretext for discrimination, the employee can show instances in which employees outside a certain categorization were treated better in comparable situations, the manner in which the employee was treated in the workplace, the employer's reaction to legitimate civil rights activities, or even statistics that may suggest a general pattern of discrimination due to a particular policy or practice.[41] In this way, disparate treatment removes unnecessary barriers in the workplace—it rids of obvious employment barriers that are not solely based upon a person's performance on the job. The burden-shifting process of disparate treatment creates a channel for each party to tell their story. The courts look to create a shared interest among all parties: creating "efficient and trustworthy workmanship," all while creating an environment that is fair and neutral.[42]

There are also claims of systematic disparate treatment. These claims, rather than looking at an individual's intent, look at the employer's actions as an entity.[43] To succeed, the employee must show that the entity they work for engaged in a "pattern or practice" of discrimination through time.[44] The employee can also show that the entity had an express policy of treating specific individuals differently, though employers rarely have express policies stating discriminatory intent; thus, the focus of these cases tend to involve a pattern or practice of discrimination.[45] The organizational and cultural bias within the entity leads to a regular, cyclical practice of intentional discrimination within these cases.[46] After the employee shows this evidence of a pattern or practice of discrimination, the burden shifts to the employer where the employer will try to rebut the presumption that it has engaged in a pattern or practice of discrimination.[47]

Successful claims of systematic disparate treatment were traditionally dependent on statistical evidence as proof of a pattern or practice of discrimination.[48] *International Brotherhood of Teamsters*

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40. *Id.*

41. *See McDonnell Douglas Corp.*, 411 U.S. at 804-05 (recognizing that these methods are not exclusive but rather examples that can guide courts).

42. *Id.* at 801.

43. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 119 (2003).

44. *Id.*

45. *Id.*

46. Stephanie S. Silk, More *Decentralization, Less Liability: The Future of Systemic Disparate Treatment Claims in the Wake of Wal-Mart v. Dukes*, 67 U. MIAMI L. REV. 637, 650 (2013).

47. *Id.* at 652.

48. *Id.* at 651.

v. United States was the Supreme Court case that "opened the door for a structural account of disparate treatment" based on this statistical evidence.[49] However, since 2011, researchers have questioned the viability for employees to even bring systemic disparate treatment claims because the ability to use statistical evidence as proof of a pattern of discrimination has been condemned by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*.[50]

In that case, female employees brought a Title VII class action claim alleging that the employer had a pattern or practice of discrimination against the advancement of women.[51] The employer allowed local managers to use broad discretion in payment and promotional decisions; however, this discretion, nationwide, was exercised disproportionately in favor of men.[52] The plaintiff class bolstered this statistical evidence as proof that the employer was aware of the disparity, yet refused to pull back on local managers' authority.[53] In culmination, the employees relied on "statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of [the employer's] female employees, and the testimony of a sociologist" to prove systemic disparate treatment through a pattern of discrimination.[54]

The Court held in favor of the employer, finding that the employees could not properly pursue a class action under the Federal Rules of Civil Procedure.[55] The Court reasoned the commonality requirement of a class action suit was not met as "it [was] impossible to say that [an] examination of all the class members' claims for relief [would] produce a common answer to the crucial question [of] why was I disfavored."[56] Although the Court did not reach the merits of the employees' systemic-discrimination claim, the Court's refusal of certification made it clear that the case would have failed on its mer-

49. Green, *supra* note 43, at 120; Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 328-42 (1977). In this case, the federal government brought a Title VII claim against the employer. The government argued that the employer had conducted a pattern/practice of discrimination and used statistical evidence showing the there was a significant disparity between the white employees and those of color in hiring, promotions, and transfers. *Id.* The Court held in favor of the federal government, finding that the employer conducted systemic disparate treatment, and noting that the statistical proof was extremely convincing. *Id.*

50. Silk, *supra* note 46, at 650, 652.

51. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011).

52. *Id.* at 344.

53. *Id.* at 344-45.

54. *Id.* at 346.

55. *Id.* at 367; FED. R. CIV. P. 23(a).

56. *Wal-Mart Stores, Inc.*, 564 U.S. at 352.

its as well.[57] The employees failed to carry their burden of offering significant proof of a practice of pattern of discrimination.[58] The Court explained the statistical evidence offered did not provide adequate support for the claim.[59] Numbers explaining disparities at a national level did not explain disparities at individual stores.[60] Furthermore, each local manager would have dissimilar reasons for the disparity.[61]

Individual disparate treatment is an ineffective alternate to systematic disparate treatment due to "the changing nature of discrimination in the workplace."[62] Acts of discrimination are generally less overt in modern society, instead discrimination lingers subtly in the background of polices and behaviors.[63] Consequently, a subtle instance of disparate treatment is much easier to see in the aggregate rather than on an individual basis.[64] In the past, employees could rely on systematic disparate treatment to make their individual claim visible.[65] But as systematic disparate treatment claims are much more difficult to bring post-*Wal-Mart*, employees are likely to rely on and need disparate impact claims even more.

B. Disparate Impact

More complex than its counterpart, disparate impact has been developed and changed throughout time. Disparate impact is designed to get rid of "practices that are fair in form, but discriminatory in operation."[66] Unlike disparate treatment that was set forth in the original 1964 Act, disparate impact was first successfully articulated by the Supreme Court in *Griggs v. Duke Power Co.*[67]

In that case, the employer required its employees to hold a high school education or pass a standardized test of intelligence as a condition of employment or as a condition to transfer.[68] Neither the education nor the test was significantly related to employee success on the job, and the effects of this condition were detrimental to diversi-

57. *See id.* at 355-59.
58. *Id.* at 356.
59. *Id.*
60. *Id.* at 356-57.
61. *Id.* at 352.
62. Silk, *supra* note 46, at 654.
63. *Id.* at 655.
64. *Id.*
65. *Id.*
66. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
67. *Id.*
68. *Id.* at 425-26.

ty—it essentially disqualified African American individuals at a substantially higher rate than their white counterparts.[69] The employer's history, prior to the enactment of the Civil Rights Act of 1964, proved injurious to the employee's case.[70] The employer previously employed African American individuals in the lowest paying jobs and denied their transfer to higher paying departments; this showed how reluctant the employer was to give equal opportunities to African Americans.[71]

The Court held in favor of the employees and explained that "procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practice."[72] The Court reasoned that although the education conditions set in place by the employer were neutrally applied to every person applying to the company, the condition led whites to fare better than the African American individuals who applied.[73] The Court expressly stated that "the touchstone is business necessity," meaning an employment practice cannot simply exclude minorities unless it is related to the job at hand.[74] The employer in *Griggs* showed no evidence that their condition was related to job performance, thus the condition must be eradicated.[75]

In the aftermath of *Griggs*, courts developed a consistent approach to proving disparate impact. The employee bringing suit must show that the employer used "a particular employment practice that cause[d] a disparate impact on the basis of race, color, religion, sex, or national origin."[76] If successful, the burden will shift to the employer who will aim to show that the contested practice is "job related for the position in question and consistent with business necessity."[77] If the employer does not meet this burden, the employee will succeed on the claim.[78] However, if the employer does meet this burden, the employee can still try to show that an "alternative employment practice," which would be consistent and just as effective in business necessity, is present.[79] By showing an alternative practice is available

69. *Id.* at 426.
70. *Id.* at 427.
71. *Id.*
72. *Id.* at 430.
73. *Id.*
74. *Id.* at 431.
75. *Id.* at 431-32.
76. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).
77. *Id.*
78. *Id.*
79. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012).

and that the employer "refuse[d] to adopt such [an] alternative employment practice," the employee can prevail.[80]

C. Ricci v. DeStefano

Trying to make the pieces of disparate impact and disparate treatment fit together in a cohesive manner has proved to be more difficult than it seemed at first glance. Indeed, the Supreme Court's decision in *Ricci v. DeStefano* completely changed the relationship between the two theories.[81]

In *Ricci*, a fire department in New Haven, Connecticut used objective examinations to award its firefighters with promotions.[82] These high-stake examinations were infrequent in New Haven, and promotions meant added respect, benefits, and a higher salary.[83] The 2003 examination resulted in white candidates significantly outperforming minority candidates; this caused New Haven to worry about potential discrimination lawsuits.[84] Select firefighters threatened a claim of disparate impact by arguing that the examination should be rendered useless as the results showed the actual exam was discriminatory.[85] Others brought a claim of disparate treatment by arguing that the examination was fair and neutral.[86] These firefighters explained that if the City discarded the examination results and denied promotions to those who had performed well due to the perceived racial disparity, that in itself was discriminatory.[87] New Haven eventually chose to throw out the examination results.[88] Sure enough, those who would have been promoted, due to their impressive examination performances, sued New Haven for their decision.[89] The employees argued that a potential disparate impact could never justify an intentional, race-conscious decision on the part of the employer.[90] New Haven, by contrast, contended that "a good-faith belief that its actions are necessary to comply with Title VII's disparate impact provision," should relieve the employer of disparate treatment liability.[91]

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80. *Id.*
81. *See* Ricci v. DeStefano, 557 U.S. 557, 563 (2009).
82. *Id.* at 562.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 562-63.
90. *Id.* at 579-580.
91. *Id.* at 581; *see id.* at 579.

The Court held in favor of the employees, finding New Haven's actions impermissible under Title VII.[92] However, the Court tried to identify a middle ground between the approaches proposed by the two parties. The Court explained that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[93] In this particular matter, the Court reasoned that New Haven had only a prima facie case of disparate impact liability, as its only real evidence of a disparate impact claim arising was a significant statistical disparity.[94] Furthermore, the examination in this case could not lead to a disparate impact claim as the examinations were job related, consistent with business necessity, and there was not an equally valid alternative that proved to be less discriminatory.[95]

This strong-basis-in-evidence standard is not new. The Court took inspiration from its reasoning and holding in *Wygant v. Jackson Board of Education*.[96] As the *Ricci* Court saw it, *Wygant*, a case revolving around the Equal Protection Clause of the Fourteenth Amendment, had developed a reputable standard applicable to Title VII cases.[97]

In *Wygant*, racial tensions were thrust upon the employment dynamics within schools.[98] The Jackson Board of Education and the local education union created a collective bargaining agreement that would protect minority groups against future layoffs with the hope of retaining a diversity of role-models within the school.[99] The agreement specified that when a layoff from employment was to occur, the teachers with the most seniority would be retained.[100] However, the agreement explicitly stated that at "no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[101] The displaced nonminority teachers challenged the policy on many grounds, including an argument that they were being fired due to their race,

92. *Id.* at 563.
93. *Id.* at 585.
94. *Id.* at 587.
95. *Id.*
96. *Id.* at 582-83.
97. *Id.*
98. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270 (1986).
99. *Id.* at 270, 272.
100. *Id.* at 270.
101. *Id.*

which was in violation of the Equal Protection Clause of the Fourteenth Amendment.[102]

The Supreme Court, relying on its profound goal of creating a diverse and unified workplace, expressed that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees."[103] Thus, the Court held that the agreement implementing non-neutral layoff policies was unconstitutional as the polices were too broad.[104] The Court explained certain governmental actions taken to remedy past racial discrimination must show a factual determination that "the employer had a strong basis in evidence for its conclusion that [the] remedial action was [indeed] necessary."[105] Layoffs impose a burden far too intrusive on individuals as it eliminates existing jobs, jobs in which the employees are typically dependent on for day-to-day living.[106] The Court reasoned that there were alternative, less intrusive means[107] of accomplishing similar goals of unity and representation.[108] Furthermore, the Court's holding and reasoning within *Wygant* is significant as it explored race-related cases, as well as offered the Court the standard used in *Ricci*.

After *Ricci*, scholars have raised new concerns about the efficacy of employment discrimination law. With the future of disparate impact uncertain, employees may have to rely almost exclusively on disparate treatment. As Part III will highlight, research at the intersection of law and psychology suggests that disparate treatment may miss some of the discrimination that Title VII is designed to prevent.

III. EXISTING CONNECTIONS BETWEEN LAW, PSYCHOLOGY, AND EMPLOYMENT

Legal scholars have increasingly researched how psychology contributes to the field of employment discrimination law.[109] Much of this scholarship delves into how the field of employment discrimination law ignores current research published by behavioral psycholo-

102. *Id.* at 273.

103. *Id.* at 277.

104. *Id.* at 283.

105. *Id.* at 277.

106. *Id.* at 282-83.

107. The Court offered the idea of adopting hiring goals as "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally," unlike the injury that layoffs impose. *Id.* at 282-84.

108. *Id.* at 283-84.

109. Krieger & Fiske, *supra* note 12, at 1003-04.

gists.[110] These studies indicate that the law is likely inadequate in advancing the goals of the Title VII's framers.[111]

Linda Hamilton Krieger pioneered the use of psychology in employment discrimination law. She believed that a great majority of employment decisions resulted not from a discriminatory motive or intent, but rather from "a variety of unintentional categorization-related judgment errors characterizing normal human cognitive functioning."[112] Susan T. Fiske and other researchers have supported the expansion of employment discrimination relief through their ideas on behavioral realism.[113] Behavioral realism, in the context of law, argues that legal doctrines which concern "human social perception, motivation, and judgment" should remain up-to-date and comparable to "advances in [the] relevant fields of empirical inquiry."[114] Thus, this theory proposes "judicial models—of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases—should be periodically revisited and adjusted so as to remain continuous with progress in psychological science[s]."[115]

Other scholars have focused their research on the presence of microaggressions within society and accordingly studied the Court's response to such microaggressions.[116] Researchers have discovered that present-day forms of discrimination are subtler than the overt behaviors of the past.[117] This change is likely due to evolving cultures and norms coupled with an increase in egalitarian attitudes and a need to be politically correct.[118] Microaggressions are some of these subtler behaviors employers use.[119] Microaggressions are essentially commonplace communications that hold a discriminatory insult towards the target individual or social group; these communications vary in their frequency and severity.[120] However, research has shown "only

110. *Id.* at 998-99.

111 *See id.* at 1010; Robin Stryker, et al., *Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science*, 37 LAW & SOC. INQUIRY 777 (2012) (arguing that social science should be incorporated in legislative and judicial law-making).

112. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995).

113. *See* Krieger & Fiske, *supra* note 12, at 998-99.

114. *Id.* at 1001.

115. *Id.*

116. Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y & L. 54, 54 (2011).

117. *Id.* at 55.

118. *Id.*

119. *Id.* at 56.

120. *Id.*

overt and intentional forms of microaggressions (microassaults)" brought to courts have an increased likelihood of success for employees.[121] Thus, although employees are categorizing these microaggressions as discrimination, the judicial system does not validate these acts as claims of discrimination unless they are severe.[122]

Lastly, scholars have also looked at understanding the theory of stereotype threat; this research shifts the focus away from the employer and towards the employee who is vulnerable to discrimination.[123] Stereotype threat is the idea that "reminders of membership in a stereotyped group could generate feelings of insecurity or inferiority, which in turn . . . impede[s] performance."[124] Stereotype threat triggers the anxiety of conforming to a preexisting negative stereotype which is harmful to the individual and his or her work.[125] The scholars who have looked into this theory hope employment discrimination law will be expanded to consider the consequences of stereotype threat.[126] That being said, the goal is to encourage employers to be proactive about these triggers to stop their harmful effects before the fact rather than after.[127]

This Note adds to the law-and-psychology literature by spotlighting a different insight from psychology: the social learning theory. Next, Part IV briefly describes the social learning theory and explores what it reveals about contemporary employment discrimination law.

IV. EMPLOYMENT DISCRIMINATION THROUGH A SOCIAL LEARNING THEORY LENS

At its base, the social learning theory explains how observation and reinforcement of thoughts or actions lead to a path of continued behavior.[128] Albert Bandura was known for bringing this theory to light through his famous Bobo doll experiment.[129] In this experiment, children observed adults interacting with a Bobo doll.[130] The study found that when the adult's behavior was aggressive towards the

121. *Id.* at 54.

122. *Id.* at 72.

123. Roberts, *supra* note 11, at 404.

124. *Id.* at 405.

125. *Id.*

126. *Id.* at 454.

127. *Id.*

128. BANDURA, *supra* note 15, at 3.

129. Albert Bandura et al., *Transmission of Aggression Through Imitation of Aggressive Models*, 63 J. ABNORMAL & SOC. PSYCHOL. 575, 575-76 (1961).

130. *Id.* at 576.

doll, the child replicated this aggression in their own interactions with the doll.[131] Thus, the theory establishes that humans acquire attitudes from indirect teachings—what they observe and how they perceive society handling similar situations.[132] Researchers within the behavioral-psychological realm believe that prejudicial attitudes come from these indirect teachings.[133]

The social learning theory illuminates several ways that disparate treatment alone fails to address the general purposes of Title VII. First, a discriminatory action towards employees, which inevitably becomes an indirect teaching, has a cyclical effect in the workplace. A single discriminatory act affects how the employer and other employees activate and apply stereotypes moving forward. As the law fails to consider this cyclical effect through its emphasis on disparate treatment, there is a consistent ignorance towards intergroup attitudes. Moreover, the sole focus on disparate treatment enhances implicit associations rather than weakening unintentional biases. This Part considers these points in turn.

A. Stereotype Activation & Application

Stereotypes are beliefs and opinions about characteristics, attributes, and behaviors of a social group.[134] Stereotypes are unique in the fact that individuals are often influenced by stereotypes even though they do not believe in them.[135] While stereotypes may seem like an automatic process, researchers in psychology have discovered that for a stereotype to be present in the external world, an individual must activate and then accordingly apply that stereotype.[136] Thus, people act on their prejudices as a result of this two-step process.[137]

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131. *Id.* at 577-78.

132. *Id.* at 580.

133. *See, e.g.*, Ronald L. Akers et al., *Social Learning and Deviant Behavior: A Specific Test of a General Theory*, 44 AM. SOC. REV. 636 (1979) (explaining that prejudicial attitudes come from indirect teachings by showing parental influence on teenage drug and drinking behavior); Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547 (2000) (explaining that prejudicial attitudes come from indirect teachings by showing that black individuals were overrepresented as criminals and white individuals were overrepresented as police officers within the local news).

134. Regina Krieglmeyer & Jeffrey W. Sherman, *Disentangling Stereotype Activation and Stereotype Application in the Stereotype Misperception Task*, 103 J. PERSONALITY & SOC. PSYCHOL. 205, 205 (2012).

135. Ziva Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCHOL. BULL. 522, 523 (2003).

136. *Id. at* 522-23, 526.

137. *Id.* at 522.

Stereotype activation is the first step within the process. An individual must put themselves, consciously or unconsciously, into a situation where a stereotype is accessible as a mental heuristic.[138] The activation process differs depending on a person's experiences and upbringing.[139] Whether automatically activated or personally motivated, stressful experiences tend to lead to stereotype activation, which is why the workplace is a prime place for stereotype activation to occur.[140]

The stereotype is not present in the external world until the second step, stereotype application, has been completed.[141] Individuals apply stereotypes when a trigger for bias is present; this means an individual will naturally apply stereotypes unless the individual prevents the application by inhibiting both stages of the process.[142] Self-enhancement goals and motivation to respond without prejudice are two primary factors which affect an individual's ability to inhibit the application of a stereotype.[143]

We can easily identify stereotype activation and application in disparate treatment cases. The employer's activation and application of a stereotype leads to a form of intentional discrimination against the employee. During this time, the employer is not actively inhibiting the application of a stereotype. The law puts an emphasis on this type of discriminatory action because stereotype applications are more explicit and visible than implicit biases; this is because the process of applying a stereotype leads to an external behavior or reaction by the holder of the stereotype.[144]

However, after *Wal-Mart* and *Ricci*, the law looks at claims of discrimination individually. Whereas systemic disparate treatment or disparate impact might have captured some of the cyclical discrimination clarified by the social learning theory, individual disparate treatment claims do not address the consequences of the employer's (or the employer's agent's) act in regard to other individuals. The social learning theory speaks of individuals learning from and acting similarly to actions they observe.[145] One discriminatory action caused by the employer becomes the start of a cycle for the employer and other employees moving forward. The employer and the employees

138. *Id.* at 523-4.

139. Krieglmeyer & Sherman, *supra* note 134, at 205-06.

140. Kunda & Spencer, *supra* note 135, at 526.

141. Krieglmeyer & Sherman, *supra* note 134, at 205-06.

142. Kunda & Spencer, *supra* note 135, at 522-24.

143. *Id.* at 524-25.

144. *See* Krieglmeyer & Sherman, *supra* note 134, at 205-06.

145. BANDURA, *supra* note 15, at 3.

will become more likely to activate and apply stereotypes that are similar to the one already applied to the workplace environment. After *Ricci*, the law is particularly unequipped to deal with these problems. Individual disparate treatment focuses on the invidious intent of isolated actors, framing prejudice as a mostly intentional, individual attitude problem. The social learning theory shows instead that employees, independent contractors, and others in the workplace learn from and react to stereotypes applied by others regardless of any actor's original attitudes or beliefs. In addition, the social learning theory exposes other shortcomings of the current approach to disparate treatment, including those related to intergroup attitudes. This Note next explores this dimension of the social learning theory.

B. Intergroup Attitudes: Social Group Categorization

Intergroup attitudes are beliefs and feelings that can develop as an individual categorizes others into social groups.[146] Traditionally, an individual categorizes another person into two social groups: those who are within their social group and those who are outside of their social group.[147] Research in psychology suggests that prejudice comes from internal and external competition between these two groups.[148] Humans are predisposed to see people within their social groups as better than those who are outside of their social group.[149] This categorization causes both anxiety and discomfort, which in turn, causes individuals to mistreat those who are outside of their social group.[150]

Intergroup attitudes leading to employment discrimination can be seen in both disparate treatment and disparate impact cases, as intergroup attitudes can be acted upon through both intentional and unintentional means. If the employer discriminates against a single employee because he or she is of a different race, the employer may have done so intentionally to advocate for the employer's own social group. However, the employer may have also discriminated unintentionally by creating a culture that is more subtly hostile to social groups dissimilar from a group to which the employer, or a majority of employees, belong to. As in the case with stereotype activation and application, the social learning theory implies that these intergroup attitudes will have a cyclical effect. Individuals will over-categorize others in their workplace because the culture inevitably supports dis-

146. Marilynn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 ANN. REV. PSYCHOL. 219, 222 (1985).

147. *Id.* at 223.

148. *Id.* at 223-24.

149. *Id.* at 224.

150. *Id.* at 224-25.

criminatory classifications. While *Ricci* made it easier for employers to avoid no-win situations, employment discrimination law lacks an effective way to address intergroup attitudes. As important, the social learning theory also shows that the law fails to address implicit associations, which are at the heart of some workplace discrimination. The Note turns to these implicit associations next.

C. Implicit Associations

Lastly, the consideration of implicit associations is nearly wiped away without the significant presence of disparate impact claims. Implicit associations are internal, largely unintentional, biases that are associated with certain concepts.[151] Implicit cognition measures have shown that the degree and severity of the bias to the concept vary.[152] Implicit associations reveal attitudes towards groups of people—attitudes so innate that they pervade most of an individual's daily interactions.[153] A highly studied area of psychology, implicit associations are often studied using Implicit Association Tests (IATs).[154] These tests are built to show how often these attitudes are present and how individuals use implicit associations as cognitive shortcuts innately.[155] The method of priming is key to these tests. Most researchers argue, within this area of psychology, that a faster response to a stimulus, after being primed, relates to a stronger association with a certain concept.[156]

Implicit associations are primarily shown in disparate impact cases, largely because they are unintentional biases. The Court's attitude toward unintentional discrimination, post-*Ricci*, is questionable indifference. Without a strong stance on debunking implicit associations and recognizing unintentional discrimination, these associations will continue to linger in the minds of the employer and the employees. Implicit associations are cognitive shortcuts; without a reprimand for such shortcut, they will continue to be used.

V. A DOCTRINAL CHANGE WHICH FURTHERS THE PURPOSES OF TITLE VII

As mentioned previously, the current Title VII jurisprudence only allows "violations of [disparate treatment or disparate impact] in the

151. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

152. *Id.* at 1468.

153. *Id.* at 1465.

154. *Id.* at 1464-65.

155. *Id.* at 1465.

156. *Id.* at 1468-70.

name of compliance with the other . . . in certain, narrow circumstances."[157] Through the strong-basis-in-evidence test, courts are essentially forcing employers to affirm they will be subject to disparate impact liability if they do not take action.[158] However, the Court in *Ricci* does not offer much guidance about what would be enough to pass muster.[159] The Court in *Ricci* sought to create a "standard [which] leaves ample room for employers' voluntary compliance efforts . . . and [for] Congress's efforts to eradicate workplace discrimination."[160] Nevertheless, by being vague, the Court is falling short on its goal. Employers will be reluctant to take action as statistical disparities and a hard look at those numbers prove not to be strong enough evidence. The result is that the law will be adding a barrier to equal opportunity rather than eradicating it, primarily due to its contributions to cyclical discrimination.

Should the Court simply reverse course and restore the disparate impact regime that prevailed before *Ricci*? This Note suggests that this strategy is unwise. While *Ricci* left many legitimate cases of employment discrimination without a remedy, the Court recognized an entrenched problem facing employers. Taken together, disparate treatment and disparate impact theories left employers acting in good faith with no realistic way to avoid potential legal liability. A true solution would afford relief to employees who cannot rely on disparate treatment, while guaranteeing fairness to employers trying to fulfil the mandate of Title VII.

Based on the teachings from the social learning theory, the Court should create a test that organizes itself around three major goals as it searches to reunite the theories of disparate treatment and disparate impact. First, courts should aim to increase motivation to prohibit stereotype application. Second, courts should focus on deconstructing social group categorization. Lastly, courts should attempt to recognize the effect of implicit associations due to their abundance and seek to quash negative associations from replicating.

A. A Balancing Test

The best way to accomplish these goals, while also considering the Court's concerns in *Ricci*, is to create a new balancing test. Specifically, the Court should adopt a balancing test with five prongs based on legal-psychological research. The prongs should be as follows: (1) the severity and practicality of the employer's fear of litigation; (2) the

157. Ricci v. DeStefano, 557 U.S. 557, 583 (2009).

158. *Id.* at 583, 585.

159. *Id.* at 586-87.

160. *Id.* at 583.

good-faith effort of the employer to rid of discrimination in the past and present; (3) expectations previously established by the employer; (4) fairness to the employer and the employees; and (5) potential prejudicial attitudes that will be added to the community due to the employer's decision.

Although the Court in *Ricci* dismissed the employer's fear of litigation in its test due to concerns about employers taking unnecessary discriminatory action too early, the condition of fear has merit.[161] By taking fear out of the equation, the Court implied that many—if not all—employers' fears would be unreasonable. But as *Margerum* and *Ricci* show, some employers will quite reasonably believe that a practice has had a disparate and discriminatory impact. While some employers may be jumping the gun, others will have severe, legitimate, and reasonable fears that the law should respect. The first prong focuses on the severity and reasonableness of the employer's fear; this allows courts to ensure that the employer does not overestimate the risk of litigation, while still recognizing that the employer may have identified bona fide examples of discriminatory impacts. This analysis helps reduce the effects of cyclical discrimination by awarding the employer for thinking through potential discriminatory effects of their employment decisions. This extra thought process, coupled with motivation for reduced prejudicial attitudes, reduces stereotype application moving forward.[162] If the employer has a reasonable, significant fear that a practice has had a disparate impact, courts should more readily allow the employer to take what seems to be a discriminatory action to prevent a more serious prejudicial impact.

The second prong explores the good-faith effort of the employer, in the past and the present, to eliminate discrimination. If the employer has actively tried to rectify the effects of past or present-day discrimination, it is more likely that the employer will continue acting towards advancing this goal. Because the employer could have a change of heart, this prong looks at the present circumstances to examine the employer's stake in the matter asserted. Like the first prong, the second prong also considers past practices of inclusion and opportunity in the hopes of encouraging the employer to address discriminatory effects.[163] In turn, this helps reduce cyclical discrimination in the workplace. This prong also seeks to deconstruct social group categorizations by reducing actions that cause "ingroup" vs. "outgroup" distinctions.[164] For example, if a police department had a

161. *Id.* at 581.

162. Kunda & Spencer, *supra* note 135, at 524-25.

163. *Id.*

164. Brewer & Kramer, *supra* note 146, at 223-24.

history of changing their entry test to rid of a disparate impact, with time, more minorities would be admitted and classifications based on a particular trait would evaporate due to new, less-dividing norms. If the employer exercises continual efforts to rid of discriminatory practices, the courts should weigh towards allowing a discriminatory action that seeks to rid of either disparate treatment or disparate impact.

The third prong, which looks at the expectations previously established by the employer, is related to the second prong in that it considers past acts by the employer. If the employees were under the impression that performing in a specific way would lead to a reward, then the court should consider that expectation. This prong recognizes the goal of the Court's holding in *Ricci*, and it attempts to give weight to it.[165] If the employer created an objective way of dealing with employment decisions, then it would be intentionally discriminatory to not abide by that due to a disparate effect.[166] Disparate impact was not created as an exception to disparate treatment, and it should not be looked at as thus. Rather, it should be seen as a safety valve for employees to seek relief when intent is difficult to prove.[167] Furthermore, this particular prong specifically tackles implicit associations as it seeks to remove negative attitudes individuals have towards minorities.[168] The purpose of Title VII was not to create an advantage for minorities, but rather an equal opportunity.[169] When individuals believe an advantage is given, those without the alleged advantage are more likely to develop negative implicit associations about minorities and apply them in everyday interactions, including at work. If the employer is not following previous expectations given to employees, the courts should weigh against allowing a discriminatory action that seeks to rid of either disparate treatment or disparate impact.

The fourth prong considers fairness to each party involved in the dispute. The purpose of this prong is to give courts an area of deference. This prong considers each side of the dispute as it searches for the action that seems the most just for the situation. The purpose of putting emphasis on fairness is to force employers to think of the long-term effects of their actions in the workplace.[170] The employer should be dealing with single acts of discrimination with awareness

165. *Ricci*, 557 U.S. at 581.

166. *Id.*

167. *Id.*

168. Greenwald et al., *supra* note 151.

169. *Ricci*, 557 U.S. at 580.

170. Kunda & Spencer, *supra* note 135, at 524-25.

of how it will shift the workplace environment and the attitudes within it. If the employer's actions caused an imbalance of fairness, the courts should weigh against allowing a discriminatory action that seeks to rid of either disparate treatment or disparate impact.

The final prong solely focuses on psychology's contribution to the law as it considers prejudicial attitudes that will be added to the community due to the employer's decision. If the employer's action will lead to a discriminatory practice that will develop into an informal industry standard or strengthen existing prejudicial effects, the action should be deemed contrary to the purpose of Title VII overall. It may be difficult to obtain evidence of community effects, but by studying trends and with the help of expert witnesses, it is possible that this prong may be the most influential in eradicating discrimination in the workplace. This prong touches each lesson of the social learning theory. It forces the employer to consider future effects of its actions by decreasing the possibility of stereotype application, preventing social group categorization from spreading, and hindering negative implicit associations from pervading employment decisions.[171] If the employer's actions will cause harm to the community by enhancing or creating additional prejudicial attitudes, the courts should weigh against allowing a discriminatory action that seeks to rid of either disparate treatment or disparate impact. How would this test work in practice? Next, this Note illustrates the application of the proposed balancing test by taking a second look at the facts of *Ricci.*

B. The Balancing Test as Applied to Ricci

When applying the proposed balancing test to the facts of *Ricci*, the outcome, while close, is different. The first prong delves into the severity and practicality of the employer's fear of litigation. In *Ricci*, after the examination results showed such a large statistical disparity between races, the New Haven Civil Service Board had half a dozen meetings to interview witnesses, conduct validation studies, and review the exam-development process.[172] The City also opened a public debate prior to the decision.[173] This public debate showed evidence of pending litigation as firefighters threatened a disparate treatment lawsuit if the City threw out the examination results, while other

171. *See supra* notes 97-114 and accompanying text (discussing how psychological research shows disparate treatment alone fails to address the general purpose of Title VII).

172. *Ricci*, 557 U.S. at 567-74.

173. *Id.* at 562.

firefighters threatened a disparate impact lawsuit if the City abided by the exam results.[174]

Thus, although the City only had statistical evidence underlying the potential disparate impact of the exam results, the heated public debate showed how serious this decision was for the firefighters. The firefighters were unlikely to let this situation fall through the cracks and that is even more explicit due to how the City handled the situation. Moreover, the statistical evidence available to the City, combined with the lack of less discriminatory alternatives, made fear of disparate impact liability reasonable. The number of steps and time taken to make a decision is relevant in showing the severity of the threat of litigation from the City's point of view. The evidence available to the City further shows that the City's fear was reasonable. Since the City faced a realistic threat of litigation, this prong leans towards allowing the City's action of throwing out the examination in efforts to avoid a disparate impact lawsuit.

The second prong surveys the good-faith effort of the employer to rid of discrimination in the past and in the current situation. In *Ricci*, the City took considerable precautions when creating the examination in question, showing a good-faith effort to rid this situation of discrimination.[175] The City hired an outside company to develop and administer the examination; it even endured a cost of $100,000 to do so.[176] The willingness of the City to spend this much on a simple promotional exam shows how important this was to the City. The company that developed this exam performed job analyses to identify the skills necessary for the higher positions, interviewed current supervisors, and observed on-duty officers.[177] The company was careful and deliberate to watch for discriminatory effects as it oversampled minority firefighters at each stage of development; the purpose of this process was to not unintentionally favor white firefighters.[178] The City also gave each firefighter an equal amount of study time.[179] To avoid controversy, the City insisted that all examination assessors would come from outside the state (a majority of the assessors were also minorities).[180] Lastly, there was no evidence that the City tried to disfavor white firefighters. The City took necessary precautions to

174. *Id.*
175. *Id.* at 564.
176. *Id.*
177. *Id.*
178. *Id.* at 564-65.
179. *Id.*
180. *Id.* at 565-66.

ensure that the test results would be as neutral as possible.[181] Moreover, this prong leans towards allowing the City's action of throwing out the examination in efforts to avoid a disparate impact lawsuit.

The third prong tries to uncover the expectations previously established by the employer to its employees. Within *Ricci*, the firefighters had every right to expect the examination would decide which candidates obtained promotions. The City spent over $100,000 to make this examination objective.[182] Employees and applicants would reasonably believe that the City would not have spent so much money developing the exam if it did not intend to follow through on the exam's results.[183] Also, during one of the Civil Service Board meetings, firefighters who had taken the exam had the opportunity to speak their opinion on the examination even though they had yet to discover their score.[184] At the meeting, a firefighter expressed that he had several learning disabilities and that he spent over $1,000 to prepare in a way which accommodated those disabilities.[185] The firefighter further argued that "when [a citizen's life is] on the line, second best may not be good enough."[186] Firefighters would not spend hundreds of dollars and over eight hours a day to study if they did not fully expect the exam to be valid and certified. Since the City gave expectations that this examination would be used, as well as the fact that employees had stated reliance on these expectations, this prong leans towards rejecting the City's action of throwing out the examination in efforts to avoid a disparate impact lawsuit.

The fourth prong balances subjective fairness to each party in the case. This prong is typically deferential to the court in hopes of retaining an area of judicial discretion. Thus, for this analysis, this prong would lean towards rejecting the City's action of throwing out the examination in efforts to avoid a disparate impact lawsuit simply because the court in *Ricci* leaned that way in the strong-basis-in-evidence test. The *Ricci* Court felt that the disparate impact claim was not strong enough for the City to subdue acts of disparate treatment, so the prong naturally shifts in that direction.[187]

Lastly, the fifth prong examines potential prejudicial attitudes that will be added to the community due to the employer's decision.

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181. The facts of *Ricci* did not delve deeply into prior efforts to rid of discrimination resulting from the firefighter promotional examinations, thus this part of the prong is omitted from the analysis. *See id.*

182. *Id.* at 564.

183. *Id.*

184. *Id.* at 567.

185. *Id.* at 567-68.

186. *Id.* at 568.

187. *Id.* at 585.

The City—ultimately choosing to throw out the examination results—likely dispersed less prejudicial attitudes to the community than if it decided to certify its results.[188] By recognizing the statistical disparity in the results, holding a public debate, and handling the situation through active communication with respected specialists within the fire program (in and out of the state), the City was sending a message of resistance towards discriminatory programs.[189] By advocating this resistance, the City was successfully stopping its own stereotype application and negative associations, while actively stopping others from doing so as well. Regardless of whether the examination actually was or was not developed disproportionately, the City's concern is noteworthy. The City made its decision in hopes of finding an alternative assessment method.[190] If found, other employers will also follow this method to avoid pending litigation, which naturally causes the cycle of discrimination to cease. Because the City's action likely spread less prejudicial attitudes to the community than its option of certifying the exam results, this prong leans towards allowing the City's action of throwing out the examination in efforts to avoid a disparate impact lawsuit.

Therefore, prongs one, two, and five lean towards accepting the City's action of throwing out the examination in efforts to avoid a disparate impact lawsuit, while prongs three and four lean towards rejecting the City's action. Assuming each prong has equal balance,[191] the test suggests that the employer's action was proper considering the circumstances involved in the case. This outcome supports the overall argument that disparate impact is needed and valid in accomplishing the purposes of Title VII.

VI. POSSIBLE MISSTEPS: A CONSIDERATION OF COUNTER-ARGUMENTS

Each prong of the proposed balancing test could create, as well as, solve problems. However, each prong serves a powerful purpose, and the overall balancing test promises to strike a better balance between fairness to employers and a commitment to eliminating employment discrimination.

Critics may suggest that the "severe" and "practical" fear mentioned in prong one may be too vague. Will these terms be so open-ended that parties will have difficulty predicting ex ante what will count as legitimate employer actions? While the balancing analysis

188. *Id.* at 574.

189. *Id.* at 562, 567-74.

190. *Id.* at 573-74.

191. For purposes of this example, each prong was balanced equally. That being said, this balance may shift in practice depending on the evolution of case law.

proposed here does leave room for a careful sifting of the facts in each individual case, there are several guideposts that courts should use in measuring the severity and practicality of the fear. Courts should look at the employer's behavior, including the time, money, and resources invested in measuring or preventing workplace discrimination. The employer will only spend time, money, and resources into a situation if it fears its actions have the potential to be a problem. Courts should also weigh whether some class of employees or applicants have threatened or commenced litigation. Threat of litigation alone does not necessarily imply satisfaction of this prong. Nevertheless, courts should take into account whether the employers are aware of a potential lawsuit. Finally, courts should consider the evidence available to the employer about the merits of any pending litigation. If a fear of litigation is reasonable, that factor should weigh in the employer's favor.

Another potential problem addresses the good-faith prong, prong two, of the balancing test. Employers may fake good-faith efforts in the past in hopes of satisfying this prong in the future. However, there are measures that could smoke out fake good-faith efforts.[192] Evidence such as employees' feelings about the employer or workplace culture cannot be faked. The results of past efforts may also be revealing. Ineffective policies that the employer does not amend might suggest that an intention is less than authentic.

Does the test inadvertently protect employers who once acted in good faith but have begun implementing more discriminatory practices? Courts again could look for evidence of pretext, including overt actions or statements made by the employer and statistical evidence of the impact of the employer's actions. For example, in *Ricci*, it was obvious that the City had every intention of using the results from the examination, and while the City may argue this was not an expectation it meant to give, it still was conveyed.[193] When the City threw away the examination results, the action was overtly noticeable.[194]

The fourth prong, dealing with fairness, also creates a very realistic problem: if the fourth prong acts as a tie-breaker in similar situations, there is a high probability of different outcomes in similar cases due to jurisdictional differences in the balancing test. However, this is a concern with all balancing tests. While the prong acts as a subjective, deferential component, courts are likely to follow sister

192. *See supra* notes 34-35 and accompanying text (discussing evidence used to prove pretext in disparate treatment claims).

193. *Ricci*, 557 U.S. at 564.

194. *Id.* at 574.

courts when looking for guidance. Furthermore, courts need flexibility. When disparate treatment and disparate impact are in tension with one another, courts should justifiably account for small factual differences between cases. Important interests are different per employer and per particular classes of employees, and courts should have the flexibility to strike the fairest balance in an individual case.

The final concern, located in the fifth prong surrounded upon prejudicial attitudes that added to the community, is one mentioned in *Ricci*. The fifth prong may allow disparate impact to overshadow disparate treatment, which was the original purpose of the Act.[195] However, due to the balancing of other components, this prong does not allow disparate impact to overshadow disparate treatment, but rather allows disparate impact to work alongside disparate treatment. The impact of pushing towards a strong-basis-in-evidence test is that it virtually removes additional protections given to the employees. By having a prong focused on disparate impact, while having the rest touch more heavily on disparate treatment, the Court's concern in *Ricci* is still recognized.

VII. CONCLUSION

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[196]

The law needs to face reality. The current employment discrimination jurisprudence does not accurately reflect and address the experiences of individuals in the workplace. The Court's beliefs held in the above quote, while still valid and respected, are not being abided by. By allowing behavioral psychology to influence the way the law understands discrimination, the court system can take active measures to break the cyclical efforts of discrimination that it nourishes. After the Court's decision in *Ricci v. DeStefano*, the law's current viewpoint towards disparate impact is uncertain in comparison to its counterpart, disparate treatment. However, given the constant flux of prejudicial attitudes in society, disparate treatment alone fails to accurately address the purposes of Title VII.

Moreover, the difficulties with the test in *Ricci* go beyond those identified in current scholarship. The social learning theory of psy-

195. *Id.* at 581.

196. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

chology shows why disparate impact's vitality is necessary for progressive social change. A balancing test, rather than a strong-basis-in-evidence test, would likely help courts achieve this goal. A balancing test can give the employees being discriminated against a fighting chance to redress unjust situations, so that those after them will not have to.